

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	CS Docket No. 01-129
Competition in the Market for the)	
Delivery of Video Programming)	

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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INTRODUCTION AND SUMMARY	1
I. A COMPETITIVE VIDEO MARKETPLACE IS MORE EVIDENT THAN EVER	1
II. THERE IS NOTHING IN THE RECORD TO SUPPORT CALLS FOR GOVERNMENT INTERVENTION IN THE VIDEO MARKETPLACE	4
Market Power.....	5
Program Access	8
DBS Must Carry	11
Interactive TV	13
Cable Service in Rural America	16
CONCLUSION.....	17

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The National Cable & Telecommunications Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

All the evidence and all the trends are crystal clear. There is vibrant competition among providers of multichannel video programming distributors, and consumers can choose from an array of alternative providers. Indeed, as in years past, the only commenting parties who suggest otherwise are cable's competitors, who continue to use this proceeding as a forum for seeking further regulatory advantages. If the Commission ignores this regulatory gamesmanship and focuses on the subject of these annual inquiries – *i.e.*, the status of competition in the delivery of video programming – it can only conclude that competition is flourishing.

I. A COMPETITIVE VIDEO MARKETPLACE IS MORE EVIDENT THAN EVER

The initial comments in this proceeding confirm that competition is thriving in the video delivery marketplace.¹ Today consumers nationwide may turn to direct broadcast satellite

¹ See Comments of NCTA, AT&T, Comcast; *see also* evidence of DBS and wireline subscribership growth in Comments of SBCA, DirecTV, and RCN.

("DBS") as a fully substitutable alternative to cable for MVPD service. And wireline providers are becoming more and more available as cable overbuilders put down stakes in densely populated cities and surrounding communities to compete with incumbent cable operators. The idea that cable is the only choice available to a consumer who wants multiple channels of video programming is well past its time.

The evidence provided by the cable and DBS industries demonstrates that DBS has continued its remarkable growth in subscribership. According to the Satellite Broadcasting and Communications Association ("SBCA"), the satellite industry (including both DBS and C-Band, which is declining in numbers) has "gained more than 2.6 million net subscribers" over the past year, and now serves 17 million households, an 18 percent increase from a year ago.² SBCA also showed that DBS companies alone added more than three million customers over the past year, bringing the total to just over 16 million customers. SBCA attributes this growth in large part to the industry's expansion of the retransmission of local network signals pursuant to the Satellite Home Viewer Improvement Act. According to SBCA, DBS providers offer so-called local-into-local service in "at least seven more markets than last year when we reported the tremendous favorable impact that the section 122 license contained in SHVIA had on subscriber growth."³

SBCA also echoed NCTA's findings on DBS's share of multichannel subscribership state-by-state:

As DBS subscriptions continue to increase, so does the penetration rate of satellite television in the U.S. From April 2000 to April 2001, the average satellite television growth rate was 24.86% per state. For the first time ever, one state has more than 4 out of 10 television households receiving multichannel video programming via satellite (Vermont - 41.27% penetration). Five states boast more than 3 out of 10 television households subscribing to television

² SBCA Comments at 2.

³ *Id.* at 3.

programming via satellite (Montana, Wyoming, Mississippi, Arkansas, and Vermont).⁴

Thus, SBCA's figures show that the number of states where DBS serves more than 30% of multichannel customers has increased from three to five states over last year. In 30 states, DBS serves more than 20% of multichannel customers. And in 45 states, it serves at least 10% of multichannel customers.⁵ This growth is escalating day-by-day, with SBCA data showing the number of new DBS subscriptions in 2001 nearly *triple* the number of new customers per day just seven years ago. And the satellite industry is gaining subscribers by offering new two-way broadband Internet service.⁶

DirecTV reported a significant milestone achieved in June 2001, just seven years after launching its first satellite: subscribership of ten million households nationwide.⁷ The company also noted that "roughly half of DirecTV customers were cable subscribers at the time they first subscribed to DirecTV."⁸

Beyond satellite providers, broadband wireline providers are making inroads in the competitive MVPD marketplace. Despite its claims regarding the cost of establishing a second local broadband network, RCN, the largest broadband overbuilder, confirms that in the past 12 months it has "continued to build out its network, to increase penetration in its chosen markets, and to tackle competitive barriers . . ."⁹ RCN is providing open video service or franchised cable service in "7 of the nation's 10 largest metropolitan" areas: Boston, New York,

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *Id.* at 5.

⁷ DirecTV Comments at 1.

⁸ *Id.* at 11.

⁹ RCN Comments at i, 5.

Philadelphia suburbs, Washington, D. C, Chicago, San Francisco, and Los Angeles suburbs.¹⁰

The company reports "substantial growth" in all of these markets.¹¹ And it acknowledges that it enjoys certain competitive advantages in the form of newly designed and installed fiber optic network, and the ability to offer bundled services from the start.¹²

There is no denying that over 20 million multichannel video subscribers – almost 23 percent of the total customers – obtain multichannel video programming from a company other than their local cable operator. This reflects an increase of over 2.9 million consumers (16.9%) over a year ago. And as NCTA has shown, year after year, the cable industry's share of multichannel video subscribers has decreased – now to just over 77 %.

In light of these facts, the Commission should feel confident finding that competition has taken hold and that consumers nationwide have formidable substitutes for cable television.

II. THERE IS NOTHING IN THE RECORD TO SUPPORT CALLS FOR GOVERNMENT INTERVENTION IN THE VIDEO MARKETPLACE

Despite the growth trends in non-cable subscribership, RCN and others call for the Commission to "continue to take steps to facilitate the development of other forms of MVPD competition."¹³ As if program access rules, more favorable inside wiring rules and other regulatory measures are not enough, RCN, EchoStar and other cable competitors still seek an unfair and artificial leg up in the raging battle for subscribers. Over the past eight years, the Commission has monitored the distribution of video programming and has made modifications in its rules where appropriate. But it has declined to skew the competitive marketplace in favor

¹⁰ *Id.* at i.

¹¹ *Id.* at 6.

¹² *Id.* at 3.

¹³ *Id.* at v.

of one provider over another without hard evidence that further regulatory intervention is warranted. Nothing in this record changes that view.

The litany of annual complaints in this proceeding from cable's competitors involve, in most cases, pending or upcoming proceedings, including program access regulation, access to inside wiring in multiple dwelling units, DBS must carry requirements, and compatibility between cable and consumer electronics equipment. The views of all interested parties have been fully set forth in the comments in those ongoing proceedings.¹⁴ NCTA will respond briefly to four areas: allegations of cable market power, expanded program access regulation, loosening of DBS must carry requirements, and regulation of nascent interactive television services.

Market Power

EchoStar again resorts to naked – and inaccurate – claims about cable's market power. It argues that cable's "market power is evident not only from the predominant share of subscribers served by cable operators, but also from the continuing cable rate increases and the relatively few determinations the FCC has made to date finding effective competition in particular cable franchises."¹⁵

First of all, with regard to cable prices, there is no factual basis to support Echostar's claims. As NCTA showed in its initial comments, U.S. Department of Labor, Bureau of Labor Statistics (BLS) figures show that cable price increases have moderated significantly during the two-plus years of cable rate deregulation. The latest BLS statistics show that increases in the cable price index in the last 15 reported months exceeded inflation by less than 1 percent. Moreover, as measured by BLS data, cable rate increases have shrunk significantly since 1999 –

¹⁴ See, e.g., CS Docket No. 95-184 and MM Docket No. 92-260 (cable home wiring); CS Docket No. 97-248 (program access); PP Docket No. 00-67 (compatibility between cable systems and consumer electronics equipment); WT Docket No. 99-217 and CC Docket No. 96-98 ("competitive networks").

despite rate deregulation and full-blown DBS competition – compared to 1996-1999, when rates were still fully regulated. All of this has happened at a time when cable operators have faced increasing upgrade and programming costs.

Moreover, NCTA and AT&T explained in their initial comments that as a matter of economics, market power *cannot* be inferred from the mere fact that cable still serves a relatively high (though steadily declining) percentage of multichannel subscribers. A high market share may, in some circumstances, be indicative of the absence of competition in a relevant market. But where, as here, a new, fully substitutable product is challenging an incumbent that formerly served almost 100 percent of the market, the incumbent's continued high (and steadily diminishing) share is hardly proof that it can continue to exercise any significant market power.¹⁶

Then-Commissioner Michael Powell acknowledged this point in the Fifth Annual Report on Video Competition when he stated that "what must be understood is that market share alone does not support the conclusion that a given cable operator is exercising market power to the detriment of consumers."¹⁷ Economists and antitrust agencies typically look to a variety of dynamic factors, including the presence of a good substitute, such as DBS, which has the capacity to add new subscribers nationwide at virtually no marginal cost. In these circumstances, as NCTA pointed out in its comments, the presence of a substitute is likely to constrain any conceivable exercise of market power regardless of the percentage of subscribers

¹⁵ EchoStar Comments at 5.

¹⁶ NCTA Comments at 34-36, *citing* NCTA Comments, CS Docket No. 99-230, August 6, 1999 (*quoting* Economists Incorporated, Inc., "Use and Limitations of Structural Indicia of Market Power", Appendix C). *See* AT&T Comments at 9 - 11.

¹⁷ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifth Annual Report, Separate Statement of Commissioner Michael Powell, 13 FCC Rcd 24284 (1998). *See also* *Time Warner Entertainment v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) ("a company's ability to exercise market power depends not only on its share of the market, but also on elasticities of supply and demand, which in turn are determined by the availability of competition.")

still served by the incumbent. In fact, the incumbent may be holding on to a substantial percentage of customers only because – as seen in this case – it is responding to the new competitor by providing better products and new services.

EchoStar knows all this. It nevertheless persists in painting an implausible picture of a monolithic cable industry with a "vice-like [sic] grip" on video programming and a video marketplace characterized by "chronic cable price increases" and "high barriers to entry" in an effort to gain preferential regulatory treatment.¹⁸ In an era where cable fiercely competes with broadcast, satellite, theatrical, home video and other providers in the acquisition and distribution of television programming, Echostar's claims are simply untenable. And they are made all the more so, as Comcast pointed out, by a communications industry that "is being transformed by digital technologies, the explosive growth of the Internet, the advent of e-commerce, and similar developments" in which no competitor holds the upper hand.¹⁹

EchoStar is growing by leaps and bounds every year (adding approximately 460,000 new customers *every quarter*), is bigger than all but five cable companies, and has made a bid to acquire DirecTV. Still, it maintains that there are significant barriers to entry.²⁰ Its evidence of this is the Commission's relatively few effective competition determinations in cable franchise areas. As NCTA pointed out in its comments, as of April 2001, satellite penetration exceeded 15 percent in 40 states, 20 percent in 30 states, 25 percent in 13 states, 30 percent in five states, and 40 percent in one state.

NCTA believes the Commission should find that effective competition is now well established in these states. While the "definitions" section of the effective competition statutory

¹⁸ EchoStar Comments at 6.

¹⁹ Comcast Comments at 1.

provision, Section 623(1)(1)(B), refers to "franchise area" and not state, it is evident that DBS is ubiquitous, widely marketed, and widely accepted as a competitive alternative to cable in these areas. The circumstances that led the Commission to adopt a presumption that cable operators are not subject to effective competition have changed. In light of these changed circumstances, NCTA urges the Commission to presume that effective competition is present in all franchise areas located in those states with statewide DBS penetration above the 15% threshold.

Program Access

As in past years, several commenters continue to argue for more expansive program access regulation. And in anticipation of the Commission's upcoming program access proceeding, they register their opposition to the scheduled sunset of the ban on exclusivity in the program access rules.

In particular, DirecTV asserts that cable operators are engaging in "terrestrial evasion" and argues that the Commission's "unduly narrow construction of the law" has "threatened the ability of DBS operators to secure crucial programming from increasingly clustered and vertically-integrated cable incumbents."²¹ The Wireless Communications Association ("WCA") too complains about cable operators consolidating systems into clusters and withholding programming from competitors by using terrestrial delivery.²² Yet the well-documented pattern of the last eight years is that virtually all of the most popular and widely viewed cable program networks are available from DBS and other multichannel video distributors.

Despite enjoying their own exclusive programming deals, cable's competitors would have the Commission require that all programmers who sell to cable operators make their services

²⁰ NCTA Comments at 8, *citing* "Cable slows, DBS sprints," *Broadcasting & Cable*, June 4, 2001.

²¹ DirecTV Comments at 8-9. *See also* RCN Comments at 9-16.

²² WCA Comments at 3-4. *See also* Carolina Broadband Comments at 10-12.

available to every competing MVPD at virtually identical prices, terms and conditions. But the program access provisions of the 1992 Cable Act were never intended to eliminate exclusivity nor ensure that every program network be made available to every competing video provider. As NCTA showed in its initial comments, Congress intended, recognizing the many pro-competitive benefits of exclusivity, only to prohibit exclusivity that is intended or is likely to "kill" the competition. Cable's competitors are prospering. Nevertheless, these competitors want the Commission to give them an artificial boost by impeding cable's ability to enter into exclusive program arrangements.

EchoStar, in particular, makes a number of unsupported and insupportable claims regarding the program access rules. For example, EchoStar asserts that cable operators extract anti-competitive terms and conditions from programmers, and that vertically integrated programmers extract more onerous terms and conditions from unaffiliated distributors.²³ Yet, EchoStar provides no examples of such behavior, no citation referencing any Commission or court finding of such discrimination, and no other evidence of any kind to sustain its allegations.²⁴ Similarly, EchoStar asserts that there is "increasing and disconcerting migration of cable programming to terrestrial transmission," but provides no evidence to buttress that claim.²⁵

²³ *Id.* at 5.

²⁴ EchoStar seems to be establishing a pattern of relying on wholly unsupported allegations of supposedly unfair and anticompetitive conduct by program providers in order to attempt to gain more favorable terms via regulation than it is able to obtain in arm's length negotiations. Most recently, for example, in *EchoStar Satellite Corporation v. Young Broadcasting, Inc., et al.*, File No. CSR-5655-C, DA 01-1865 (released Aug. 6, 2001), the Commission found that EchoStar had failed to support any of its multiple allegations that a broadcaster had breached its obligation to negotiate retransmission rights in good faith.

²⁵ *Id.* at 11.

Indeed, EchoStar does not cite a single new example of where such “migration” is occurring, and has not done so for the last three years.²⁶

Second, EchoStar’s complaints about the Commission’s enforcement of the program access rules are without merit. EchoStar asserts that the Commission’s rejection of its program access complaints since mid-1998 evidence a lack of “vigor” in enforcing the rules.²⁷ To the contrary, these decisions demonstrate that EchoStar has repeatedly failed to bring before the Commission facts demonstrating that a programmer has engaged in discrimination.²⁸ As programmers defending themselves against these claims have argued, EchoStar’s filings are more properly viewed as fishing expeditions²⁹ rife with inaccurate and misleading statements.³⁰

Finally, EchoStar’s attempt to portray itself as a bit player that cannot negotiate fair contracts with programmers without help from the government strains credulity. EchoStar is the seventh largest MVPD with over six million subscribers, and continues to enjoy explosive subscriber growth.³¹ Its recent \$32 billion bid for DirecTV removes any doubt that EchoStar is

²⁶ See EchoStar Reply to Ameritech Petition for Rulemaking, filed in CS Docket No. 97-248 (Feb. 23, 1998) (citing same two markets referenced in instant proceeding).

²⁷ EchoStar Comments at 10.

²⁸ The Commission has rejected EchoStar’s complaints for, among other things, being untimely filed, *EchoStar Communications Corp. v. Fox/Liberty Networks*, 14 FCC CD 10480 (1999) (Cable Services Bureau); raising issues more appropriately considered in federal court, *EchoStar Communications Corp. v. Speedvision Network*, 16 FCC CD 4949 (2001); and ignoring the plain requirements of the program access statute, *DirecTV, Inc. and EchoStar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd 22802 (2000), *appeal docketed*, No. 01-1032 (D.C. Cir. Jan. 19, 2001).

²⁹ See *EchoStar Communications Corp. v. Speedvision Networks*, 14 FCC Rcd 9327, at n.80 (1999) (Cable Services Bureau) (noting programmers’ view that EchoStar attempted to turn an “unreasonable refusal to deal” complaint into a “price discrimination” complaint in order to force the programmer to expose all prices, terms and conditions contained in agreements with other distributors).

³⁰ See *id.* at n.22 (noting inconsistencies in EchoStar’s pleadings). See also *EchoStar Communications Corp. v. Fox/Liberty Networks, LLC*, 13 FCC Rcd 21841, at n.38 (1998) (Cable Services Bureau) (same).

³¹ Analysts project that EchoStar’s subscribership will more than double in the next few years. See, e.g., David B. Kestenbaum & Michael K. French, ING Barings, *The Impact of Interactive TV on DBS* at 10, 16 (Feb. 23, 2001) (projecting 12.5 million EchoStar subscribers by 2005). See also Press Release, *EchoStar Communications Corp., EchoStar Reports Positive Net Income, Record EBITDA and 50 Percent Revenue Growth in Second Quarter* (July 19, 2001), available at http://www.corporate-ir.net/ireye/ir_site.zthml?ticker=dish&script=400.

in need of government protection against programmers. In fact, EchoStar has shown that it is fully capable of exercising its own power over programmers. For example, earlier this month, EchoStar rejected all of the 270 requests for carriage made by broadcast stations, notwithstanding its obligation under the Satellite Home Viewer Improvement Act.³² In short, EchoStar is hardly in a position to assert that it needs Commission assistance to ensure that it can compete effectively in the MVPD marketplace.

DBS Must Carry

DirecTV complains that it is subject to onerous regulatory burdens, notably compulsory carriage of broadcast stations. It argues that the Commission has imposed the same burdens traditionally imposed on cable operators "with little thought as to how available capacity is affected."³³ SBCA argues that the coming "carry one, carry all" regime will hamper the satellite industry's ability to offer local channels to more than 60 DMAs, reaching over 80% of U.S. television households.³⁴ DBS's requests more favorable treatment in such areas as the carriage of non-commercial educational stations per DMA.

But there is always more demand for carriage of services than there is existing capacity and cable is no different from DBS in this regard. Cable operators also would rather devote scarce channel capacity to services that their customers want but are required by law to dedicate a certain amount of their valuable capacity to carriage of commercial and noncommercial broadcast stations under the must carry rules (and public, educational and governmental access

³² See "EchoStar Ruffles Feathers," *Broadcasting & Cable*, Aug. 13, 2001 (noting that while DirecTV at least made attempts to provide broadcasters with individualized reasons for its denial, EchoStar provided only a flat denial of carriage).

³³ DirecTV Comments at 7.

³⁴ SBCA Comments at 2.

channels pursuant to local franchise). DirecTV offers nearly four times as many channels as the average cable system and EchoStar has the capacity to provide over 500 channels of video, audio and data services.

As NCTA has urged in the SHVIA proceedings, fundamental principles of parity warranted Congress applying the same obligations to satellite carriers that cable operators face when they carry local signals.³⁵ The two major satellite carriers are comparable in size to large cable MSOs. In fact, DirecTV has more subscribers than all but two of the largest MSOs and EchoStar falls sixth in line of the largest MVPDs.

While there are bound to be regulatory differences between a satellite and terrestrial MVPD, the Commission should not grant DBS carriers a competitive advantage or preferential treatment over cable operators by considering less rigorous must carry requirements. As shown above, DBS providers were strong competitors before local-into-local transmissions were possible and now with this capability their size has surged dramatically in size. And unlike cable operators, DBS providers have the *choice* under their statutory scheme whether to provide local broadcast stations as part of their service in a particular market. Cable operators do not have that choice.

When DBS providers offer local-into-local service under the satellite compulsory license, "the procedural provisions applicable to section 338 (concerning costs, avoidance of duplication, channel positioning, compensation for carriage, and complaints by broadcast stations) are generally parallel to those applicable to cable systems."³⁶ Congress specifically mandated

³⁵ Congress placed "satellite carrier[s] in a comparable position to cable systems, competing for the same customers." H.R. Rep. No. 106-464, 106th Cong. 1st Sess. 101 (Nov. 9, 1999) ("House Report"); Implementation of the Satellite Home Viewer Improvement Act of 1999, Report and Order, 16 FCC Rcd 1918, 1920 (2000). See NCTA Comments and Reply Comments, CS Docket No. 00-96, July 14, 2000, August 4, 2000, respectively.

³⁶ House Report at 100.

similarly parallel must carry requirements, directing the Commission to issue implementing regulations that "include requirements on satellite carriers that are comparable to the requirements on cable operators" in the must carry statutory provisions.

The Commission should not be swayed in this proceeding to revisit its implementation of satellite must carry rules without a corresponding relaxation of the cable must carry rules.

Interactive TV

The National Association of Broadcasters ("NAB") argues that regulatory intervention in the video marketplace is needed in light of new technologies, including interactive television and electronic program guides, that will only "expand opportunities" for cable system operators "to disfavor competing content and service providers."³⁷ NAB asserts that cable operators will "associate" or "link" all of the elements needed for digital interactive television ("ITV") services through their creation of electronic program guides ("EPGs"), "which will consequently become a powerful mechanism for cable operators to favor or disfavor whatever interactive content and services they choose."³⁸

NAB provides nothing beyond bald speculation that any of this potentially anticompetitive behavior has or will occur. As NCTA explained in its comments and reply comments in the FCC's ITV proceeding, cable companies and many other providers are in only the early stages of developing a variety of services that might come under the umbrella term "ITV".³⁹ While NAB assumes that cable will be the optimum platform for distribution of digital content, the reality is that video content providers are already using or contemplating using DBS,

³⁷ NAB Comments at 4.

³⁸ *Id.* at 5.

³⁹ See generally NCTA Comments and Reply Comments in CS Docket No. 01-7, March 19, 2001 and May 11, 2001, respectively.

wireless transport, DSL, digital broadcasting and telephone lines for both the downstream and upstream components of ITV services. At this stage, there is no reason to expect cable facilities to be the dominant means of providing ITV or for cable to be any more essential in the future for the types of services the broadcasters might provide.

Moreover, even if individual cable operators become significant deliverers of interactive services, they have little or no incentive or opportunity to favor an affiliated service by discriminating against an unaffiliated one. It is unlikely that cable operators could, by discriminating against unaffiliated providers of interactive services, foreclose competition in or monopolize the provision of such services. And, therefore, they would have little incentive to discriminate against – and forego revenues from – unaffiliated services likely to be desired by their subscribers in order to favor affiliated services. In these circumstances, marketplace negotiations between cable operators and programmers are most suitable to ensuring that unaffiliated programmers are not subject to anticompetitive discrimination.

The economic and antitrust analyses accompanying NCTA's comments in the ITV proceeding explained at length why all this is so and why cable operators have a strong economic interest in providing the services from whatever source that offer customers the best value.⁴⁰ As NCTA showed, cable operators have historically relied upon and carried non-vertically integrated cable programming networks,⁴¹ and, as they begin to offer interactive services, they are similarly relying in large part on non-vertically integrated providers of such services.⁴²

⁴⁰ NCTA Comments in CS Docket No. 01-7, *quoting* E. Elhauge, "Analysis Regarding NCTA Notice of Inquiry on ITV Services"; M. Schwartz and J. Gale, "the Appropriateness of Nondiscriminatory Access Regulation for Interactive Television," March 19, 2001.

⁴¹ *Id.* at 30.

⁴² *Id.* at 40.

Nevertheless, NAB argues, as it did in the ITV proceeding, that cable operators' alleged attempts to use carriage agreements as a vehicle to restrict the Internet streaming of video programming "seem inconsistent with *at least the intent, and arguably the terms*, of section 616 and 628 of the Communications. Act."⁴³ Section 616 addresses regulation of carriage agreements and Section 628 is the program access provision.

As noted above, there is no legal or policy basis for applying program access regulations or carriage agreement rules to so-called interactive services. This conclusion is reinforced by the prohibitions in Section 621 (c) and 624(f).⁴⁴ And given the diverse nature of these services, at a minimum, it is far too premature to recommend that Congress enact new legislation subjecting them to such wide-scale government intervention. This record hardly supports such a recommendation – even assuming the Commission has jurisdiction.⁴⁵

The fact remains that broadcasters already have significant leverage in marketplace negotiations with cable operators.⁴⁶ Their broadcast and cable programming is attractive to viewers and they have the benefit of government largesse in the form of billions of dollars of free spectrum and the win-win alternatives of must carry and retransmission consent to enhance their standing. Moreover, there is absolutely no evidence that cable or any other provider has engaged

⁴³ NAB Comments at 6 (emphasis added).

⁴⁴ See 47 U.S.C. 541(c) (prohibiting regulation of a cable system as a common carrier or utility by reason of its providing any cable service); 47 U.S.C. 544(f) (prohibiting federal agency from imposing requirements regarding the provision or content of cable services).

⁴⁵ In any event, Congress enacted Section 616 to address some video programmers' claims that they could not become viable without involuntarily relinquishing ownership rights to cable operators. The provision did not, as the FCC recognized, prohibit cable operators from negotiating for and receiving exclusivity rights from programmers. Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 9 FCC Rcd 2642, 2648 (1993).

⁴⁶ See e.g. Letter to W. Kenneth Ferree, Chief, Cable Services Bureau, FCC from Curtis S. Shaw, Senior Vice President, General Counsel and Secretary, Charter Communications, CS Docket No. 01-129, Reply to NAB, August 20, 2001 (concerning NAB's inaccurate and misguided statements about Charter's position on video streaming in contract negotiations with ESPN as violating the Communications Act).

in – or has the ability to engage in – any unfair or anticompetitive discrimination against unaffiliated providers of ITV services. Nor do the proponents of regulation provide any economic or antitrust analyses to support their blanket assertions that cable operators will engage in such behavior.

As NCTA argued in the ITV proceeding, government intervention in the nascent ITV area is extremely premature and would deter innovation, investment and deployment of new ITV services. Indeed, absent clear evidence of anticompetitive conduct, guaranteeing that broadcast ITV services be carried on cable facilities to cable's customers on regulated terms and conditions would distort competition and be contrary to the public interest.

Cable Service in Rural America

The National Rural Telecommunications Cooperative ("NRTC") again questions cable's commitment to serving rural America by claiming that the cable industry has overstated the percentage of homes passed by cable, *i.e.* 97%. Based on figures from the National Telecommunications and Information Administration ("NTIA") in the U.S. Department of Commerce, it claims that cable homes may be as low as 81%. NTIA concluded that rural areas lag behind cities and surrounding urban areas in broadband deployment. Based on this conclusion, NRTC worries that if DBS companies are deterred by their must carry requirements from carrying *any* local broadcast signals in rural communities, a significant number of rural households will have no access to such signals.⁴⁷

These are arguments that NRTC raised – and NCTA answered – in last year's proceeding. As we pointed out,⁴⁸ the basis for NRTC's claim that cable may pass fewer homes

⁴⁷ See NRTC Comments at 6-11; 15-16.

⁴⁸ See NCTA Reply Comments, CS Docket No. 00-132, at 9-12.

than the 97% cited by NCTA is based on a report by the National Telecommunications and Information Administration (“NTIA”) and the Rural Utilities Service (“RUS”) which suggests that NCTA’s higher number is based only on “TV Households” passed. That’s true. To the extent that there are households with no television sets that are not passed by cable, the percentage of *all* homes passed by cable will necessarily be lower than the percentage of *television* households passed by cable.

But the notion that there is a large portion of rural America that is likely to be unserved by cable now or in the near future is not true. Although it has historically been costly and sometimes impossible to serve areas with the lowest density of homes, the cable industry’s roots are in rural America (where cable began as a community antenna television service), and the industry has remained committed to building its systems out to the lowest density that is economically feasible. And, over the years, that lowest density has become lower and lower. As we showed, putting aside the question of the *percentage* of households passed, the *number* of households passed by cable systems exceeds 100 million – and the number continues to increase each year.⁴⁹

CONCLUSION

Despite the annual protestations of competitors seeking artificial regulatory boosts from the Commission, the evidence of full and effective competition among providers of video

⁴⁹ Nielsen Media Research, FOCUS database of cable system data, as of August 15, 2001. According to FOCUS data, there are 9,196 cable headends which have reported homes passed data. These headends provide service that passes a total of 90,430,664 homes. Moreover, there are 3,156 cable headends for which FOCUS does not

programming is compelling. Competition has arrived, it is here to stay, and the Commission should say so in its Eighth Annual Report.

Respectfully submitted,

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have Homes Passed data. These 3,156 systems serve 10,130,981 subscribers. Even assuming that *every* home passed by these 1,472 systems subscribed, total homes passed for the industry would exceed 100 million.